

Dialogue

*Regulating the Forest Industry in Papua New Guinea:
An Interview with Brian D Brunton*

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Concerns over logging abuses lead invariably to questions of legality. When there has been much publicity about the consequences of logging, about the need to enhance local infrastructure, and about the importance of returning adequate revenue to the government and people, how is it possible that access to new timber areas is granted and environmentally unsustainable logging activities continue? In the case of Papua New Guinea, the new Forestry Act and Forestry Authority established in 1993 contain many provisions that seek to ensure that logging is done on an environmentally sustainable basis, that landowners be made fully aware of the value, costs, and returns entailed, and that landowner corporations be made representative of the full membership of a landholding group (PNG FA 1993). Nevertheless, many if not most current logging projects fail to conform to these requirements (Nadarajeh 1993a, 1993b, 1994). Furthermore, Forestry Act amendments currently pending, far from strengthening the commitment to accountability and sustainability, will, if passed, shorten and weaken the process by which permits and contracts are reviewed (Solomon 1995; Tannos 1996; Baing 1996).

On 15 March 1996, I interviewed Brian Brunton, a lawyer-consultant with the Individual and Community Rights Advocacy Forum, to try to gain a better understanding of the role of the legal system in the regulation of logging contracts and the enforcement of environmental regulations. The following excerpts from that interview, conducted at the forum's headquarters in Gerehu, Port Moresby, shed light on this issue and emphasize that Papua New Guinea's legal system is first, very young—with precedents reaching back only twenty years to independence—and second, has its roots in the prior colonial legal system. In addition, Brunton's comments reveal the complex interconnections of mining, petroleum,

and timber enterprises. The corporations involved in these enterprises create massive environmental impacts in areas where gardening, hunting, and fishing are still critical to people's livelihood. These corporations are, needless to say, funded primarily by outside investors with little concern for the long-term well-being of the local people. Furthermore, these multinational corporations are almost completely unregulated, insofar as there is no system of legal precedent, sanctions, or penalties through which to control their behavior. The process by which local landholders and multinational corporations make and carry out agreements occurs at great distance from the regulatory bodies responsible for overseeing the terms of leases and contracts, and this is one of the most crucial and difficult aspects of natural resource extraction. What is necessary is an on-the-ground presence of local patrols who can inform landholders of their rights and oversee the activities of the logging companies. However, the Forest Authority remains underfunded and has difficulty fulfilling its oversight role. In individual cases, lawyers, people working for nongovernment organizations such as conservation or human rights groups, and others are able to inform landholders of their legal rights. But establishing these rights in the face of corporate pressure to log requires step-by-step maneuvering through a legal and bureaucratic system that is biased in favor of business interests. What follows is digested from several unpublished reports supplied by Brunton and from our conversation.

BARLOW Whenever I have presented information to an audience interested in the issue of logging in western Pacific countries, the question always comes up: What is the role of the legal system in all of this? Why can't the logging companies be held accountable for the lack of proper contracts and for failing to meet the terms of existing contracts?

BRUNTON Such a question comes from a misconception about the nature of the legal system, both here and elsewhere. The legal system is organized primarily to protect business interests. The system operates on a contingency fee arrangement, which means that in order to pursue a complicated issue through the courts there must be money available to pay for the process. This tends to favor special interests, such as large corporations and lawyers in big firms that can afford to finance the process. Therefore the functioning of legal requirements often depends on access to the system. In Papua New Guinea approximately 97 percent of the

land is in customary hands. In many areas it is difficult for people to obtain cash at all, let alone amass hundreds or thousands of kina to pursue a legal action. They are way behind any chance of accessing legal assistance. However, if they do have the ability to access the legal system, they find that the system is weighted heavily in favor of those with political and economic power. It requires learning to maneuver within the system in a way that is against its structure.

Most legal action in Papua New Guinea has to do with settling disputes that cannot otherwise be resolved at the local level on a pay-as-you-go basis. The public solicitor has no resources to deal with something like landowner cases, but fills the narrower role of defending people on criminal charges. Even for this purpose the public solicitor is grossly underfunded and there is a backlog of about eighteen months to two years for people who have been arrested to come up for trial. There is a legal aid scheme, which is a private fund set up to help people in these kinds of situations, but it is not suited for protracted legal action, such as taking a case as far as Superior Court. Most lawyers would not have the resources or ability to pursue something like a class action suit.

It is possible to bring issues about environmental destruction before judicial review, but there is very limited ability under Papua New Guinea law to undo contracts under the Fairness of Transactions Act. This is because there is no legislation to undo transactions. Legislation that would make it possible to undo contractual agreements was drafted and passed as an act of parliament, but it has to be brought into effect by public notice and no such action has been taken due to pressure from business interests. The only reason to go to court would be that there was no other option for resolving problems. The courts are a shield to protect vested interests, not a sword to fight for the environment. We work with the Environmental Law Network based in Eugene, Oregon, which is an international organization, and through them we have become aware that this is a common situation. In most parts of the world the law cannot be used in this way.

BARLOW What kinds of issues are being addressed through the legal system? It is our understanding that multinational corporations can be held liable for breaches of contract in their home country?

BRUNTON The case being brought on behalf of landholders who live downstream from the Ok Tedi mine is an important one, and in some

ways is an exception to the situation I have just outlined. It is an example of an Australian company being sued in Australian courts for the way it has operated in Papua New Guinea. Slater and Gordon, the Australian law firm that represents the Ok Tedi landholders, developed the case after Rex Dagi, a landowner in the area, went to the Rio Earth Summit Conference in 1992. There he was able to gain the support of Australian non-government organizations that then directed him to get legal assistance. Lawyers in Papua New Guinea did not have the resources to go up against Broken Hill Proprietary Limited (BHP), a large Australian company that is the major shareholder and operating company of Ok Tedi Mining Limited. [OTML is owned by BHP, the Papua New Guinea Government, and Inmet, a Canadian company.] Subsequently the case was taken by Slater and Gordon, a firm that established itself through a suit on behalf of Australian asbestos miners. That suit, which they eventually won, took ten years and brought them A\$40 million in legal fees. When the asbestos mine was faced with the lawsuit, it was found to have no assets, and Slater and Gordon then sued the major shareholder, Commonwealth Sugar Refinery. This process established a “guiding hand principle” by which the managing company can be held liable for damages incurred through a subsidiary company. In the Ok Tedi case, BHP is liable for damages incurred by the local company, Ok Tedi Mining Company, because there is a contractual agreement establishing that BHP is really the manager for Ok Tedi. The lawsuit concerns the liability of BHP for damage that occurs in Papua New Guinea. There is an effort to introduce legislation in Papua New Guinea that will stop the landowners’ right of action overseas in a way that reduces the damage the company is liable for in Papua New Guinea. It will require that cases brought against companies operating in Papua New Guinea be tried in Papua New Guinea courts and will limit the companies’ liabilities. The Ok Tedi Eighth Supplemental Agreement Act, now being presented in parliament, reduces claims against the mining company to direct damages only.

BARLOW What will it mean if it is passed?

BRUNTON There are three kinds of damages that can be claimed: direct, consequential, and exemplary or punitive damages. *Direct* refers to the actual consequences of a company’s or an individual’s action, such as medical bills in the case of physical injury. *Consequential* refers to the problems that arise from the injury, such as loss of work or profit from a busi-

ness. Legal action follows a compensatory principle which says that an individual or group should be restored as closely as possible to the original situation. There are fairly well established scales of damage that describe permissible ranges of direct and consequential compensation. However, *exemplary or punitive damages* are intended to stop abuses of political or economic power. For example, if a policeman beats someone up on purpose, these damages could be awarded to send a message to the policeman, and policemen in general, that this is not acceptable. In the case of companies, punitive damages can be very high. The classic case is the Edsel car, which was produced and sold with a known defective part, because Ford Motor Company decided that it was less expensive to pay direct damages to injured motorists than to retool the production line. This is an abuse of economic power, and legal action resulted in heavy punitive damages. In the Ok Tedi case, Broken Hill Proprietary is worried about the possibility that they may be held liable for punitive damages. Following the collapse of the Ok Tedi tailings dam (designed to keep tons of sediment out of the river system), insurers litigated against Bechtel Engineering [then a major shareholder of the Ok Tedi Mine] and settled out of court for an undisclosed amount. This action did not establish a precedent. The tailings continue to be sluiced down the river, and K3 million is being paid in compensation through the Ok Tedi/Fly River Trust. This is a classic exemplary damage situation. The progress of the case is extremely complicated, and it is now in the Australian High Court. If BHP is successful in getting damages reduced, it will set a precedent not only for mining companies but for other companies whose activities affect the subsistence resources and health conditions of people living in the vicinity of their projects.¹

BARLOW Are there other situations that might also be addressed through legal action?

BRUNTON Leases with landholders are an important area of legal concern. At the present time there are constraints on issuing timber permits. In addition, a company that goes through the Forest Authority to obtain a timber permit must comply with many restrictions and environmental regulations to ensure landholder agreement, adequate compensation, and environmental responsibility. If the primary goal of the project is to improve the condition of the area, such as road-building or commercial agriculture, then the permit can be granted. Permits have been issued, for example, in the Aitape area to clear forest in order to establish an oil-

palm plantation. The conversion of forested land to agricultural uses is a complex and uncertain process and in some cases the intention to plant oil palm seems unlikely because of soil conditions, steep slopes, and so on. Therefore the Forest Board has established that only 5,000 hectares may be cleared at one time, and this area must then be planted before additional areas can be cleared. This requirement will slow the pace of logging and force the developing company to demonstrate that it can indeed create an oil-palm plantation and is not using this as a cover for clear-cutting. The companies will be required to demonstrate that the area is actually suitable for oil palm before they clear a larger area.

Another questionable proceeding has occurred in the timber area in Central Province awarded to Turama Lumber Company. Once a project area is established it should go to tender (that is, it should be put out for competitive bidding). In this case the timber removal permit was given directly to the company, which is a failure to comply with policy. If this is allowed, companies will be able to operate on the basis of contracts that do not require them to develop accompanying infrastructure, to proceed in accordance with conventions of environmental sustainability, or to commit themselves to subsequent development of the logged-over areas. By not going through the process of competitive bidding, these factors can be eliminated from logging agreements if the local landowners are not aware of their rights to insist on these conditions.

In yet another area, landholders have signed leases giving exclusive access to their forests to one company because they are eager to obtain a road that will give them better access to business, education, and health care. The company is inexperienced in Papua New Guinea and has probably underestimated the problem of transporting the logs out of the area. The costs are likely to be borne by the landholders rather than the logging company. Shifting this cost burden will drastically reduce the profitability for the communities, which will also suffer the consequences of losing their forest. It is unlikely that these leases will stand up to legal scrutiny, should they be challenged. Perhaps the greater challenge is one of enforcing such restrictions in very remote areas.

Note

1 On 11 June 1996 an out-of-court settlement was reached whereby BHP has agreed to pay legal costs incurred by the landowners (A\$7.6 million), compensa-

tion for environmental damages (trust funds of A\$110 million for the plaintiffs and another A\$40 million earmarked for the people of the lower Ok Tedi, where the damage is greatest, plus acquisition by the state of an additional 10 percent equity in the mine for the people of Western Province), and to develop a tailings containment program. The case establishes no legal precedent and has no direct effect on a PNG law that made participation in foreign legal proceedings illegal.

References

Baing, Andrew, MP

1996 Minister for Forests Press Statement. *National*, 12 March: 22.

Nadarajah, Tahereh

1993a Effectiveness of the Papua New Guinean Environmental Planning Act 1978 in Forestry Timber Projects. Discussion Paper 69. Boroko: National Research Insititute.

1993b Forest Policy and Conservation of Papua New Guinea's Forests: A Critique. Discussion Paper 70. Boroko: National Research Insititute.

1994 The Sustainability of Papua New Guinea's Rain Forest Resource. Discussion Paper 76. Boroko: National Research Institute.

PNG FA, Papua New Guinea Forest Authority

1993 *Corporate Plan 1994*. Waigani: Papua New Guinea Forest Authority.

Solomon, Anna

1995 Logging in Melanesia: Curbing the Forests Minister's Key Power. *Uni Tavar*, September.

Tannos, Jonathan

1996 Logging Code a Condition for Aid from World Bank. *Papua New Guinea Post-Courier*, 8 March: 2.